

ARTHUR M. SOLENDER
LYNN DEVEREAUX

IBLA 84-119

Decided February 13, 1984

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, denying petition for reinstatement of oil and gas lease W 62746-A.

Affirmed.

1. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases:
Termination

Under 30 U.S.C. § 188(c) (1976), a lease terminated automatically for untimely payment of annual rental may be reinstated where the rental is paid within 20 days and upon receipt of a petition for reinstatement showing that reasonable diligence was exercised or that the failure to make timely payment was justifiable. In the absence of such proof, the petition for reinstatement is properly denied.

2. Words and Phrases

"Last address of record." Where 43 CFR 1810.2 requires the Bureau of Land Management to deliver communications by mail to the last address of record, such address is the most recent one provided for the case file by the lessee with the declared intent that all required communications be delivered there. Where a party has not so specified, the appearance of a different return address on an envelope or rental payment check received by the Bureau of Land Management does not constitute a change of the address of record.

3. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases:
Termination

Reasonable diligence ordinarily requires mailing the payment sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the mail. Mailing a rental payment after it is due does not constitute reasonable diligence. The postmark date of a rental

payment is generally considered the date of mailing, unless there is satisfactory corroborating evidence to support the lessees' assertion that the mailing occurred at an earlier date.

4. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Termination

A late payment may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessees' control which affected their actions in paying the rental fee. Unsubstantiated speculation as to errors in handling and processing the payment by the U.S. Postal Service is not evidence of extenuating circumstances which will justify the untimely rental payment.

APPEARANCES: Arthur M. Solender and Lynn Devereaux, pro sese.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Arthur M. Solender and Lynn Devereaux are the lessees of record for oil and gas lease W 62746-A, which was issued effective June 1, 1978, for 608.32 acres situated in Fremont County, Wyoming. The annual rental payment was due on or before June 1 of each year. The 1983 rental fee was tendered by personal check drawn on a joint account in the name of Elsie Solender and A. Michael Solender. It was endorsed "Elsie Solender" and dated "5/27 19 83." However, this check was not received by the Wyoming State Office, Bureau of Land Management (BLM), until June 6, 1983. The envelope containing the rental check bore a postage meter stamp dated May 28, 1983, but it was postmarked June 3, 1983.

BLM issued an oil and gas lease termination notice for this lease on June 10, 1983, for the failure to timely tender the rental payment. It was sent by certified mail to the return address appearing on the envelope in which the payment check was mailed. That address also appears on the payment check. However, the notice was returned to BLM on August 11, 1983, marked "Unclaimed."

Meanwhile, on June 17, 1983, BLM received a letter from "Mrs. E. Solender" asserting that payment of the rental by check was sent on the same day it was issued, May 27, 1983. BLM treated this letter as a petition for reinstatement of the terminated oil and gas lease. After considering the circumstances of the termination and the comments in the letter, it denied reinstatement in a decision dated June 28, 1983. The decision was also sent by certified mail to the lessees and was returned "Unclaimed" on August 1, 1983.

On October 25, 1983, BLM received a letter from the lessees requesting reinstatement of their oil and gas lease. They asserted that they had no notice of the lease termination until October 17, 1983, when they received U.S. Treasury Check No. 21,873,617 refunding their \$609 rental fee with the

notation "W62746 A REINSTATEMENT DENIED." In its reply dated October 26, 1983, BLM explained the automatic termination of the lease and its denial of what it interpreted to be the petition for reinstatement. This reply was sent by certified mail to the same address used in mailing the notice of termination and the June 28, 1983, decision, and it was received and accepted on October 31, 1983, according to the return receipt.

On November 7, 1983, Solender and Devereaux filed a notice of appeal and statement of reasons, wherein they acknowledge the October 26, 1983, letter and request reconsideration of the lease termination. They state that when they approached the local branch of the U.S. Postal Service they were not given an explanation concerning why the certified mail was not delivered, but were informed that their regularly assigned mailperson was on vacation. They argue that they used due diligence in mailing their rental payment on May 27, 1983, asserting "[g]enerally, one can expect delivery no later than two days following mailing."

[1] Failure to pay the annual rental for an oil and gas lease on or before the anniversary date of the lease results in the automatic termination of the lease by operation of law. 30 U.S.C. § 188(b) (1976). The Secretary of the Interior may reinstate oil and gas leases which have terminated for failure to pay rental timely where the rental is paid within 20 days and upon receipt of a petition for reinstatement which evinces that such failure was either justifiable or not due to a lack of reasonable diligence. 30 U.S.C. § 188(c) (1976).

[2] Departmental regulation, 43 CFR 3108.2-1(c)(1)(iii), requires that the petition for reinstatement be filed within 15 days after receipt of the notice of termination. Solender and Devereaux allege that they had no actual knowledge of the termination until October 17, 1983. The records show that the notice of termination was transmitted, but was returned "Unclaimed." The general rule applied by the Department in such circumstances appears in 43 CFR 1810.2, relating to communications by mail, as follows:

(a) Where the regulations in this chapter provide for communication by mail by the authorized officer, the requirement for mailing is met when the communication, addressed to the addressee at his last address of record in the appropriate office of the Bureau of Land Management, is deposited in the mail. [Emphasis added.]

(b) Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. [Emphasis added.]

The focus of the provision is to provide sufficient notice to a party entitled to it, but its purpose is to protect BLM where the failure to accomplish delivery is the fault of the person intended to receive it. William F. Heins III, 74 IBLA 133 (1983). However, unless it has been strictly complied

with, including mailing the document to the last address of record, a presumption of receipt of a document cannot arise under the regulation. See William F. Heins, *supra*; Brooks Griggs, 51 IBLA 232, 87 I.D. 612 (1980).

Although a definition of the "last address of record" is not provided, it is, in essence, that place where the party to receive documents has declared he will receive such delivery. It is an "address of record" because it is supplied with the intent that it be utilized whenever documents are to be sent. The most recent, or last, address provided for such receipt is that to which BLM is obligated to deliver. Generally, with oil and gas leases, it is the address appearing on the lease offer form or, in this case, the approved lease assignment form. A departure from use of such address should occur only after the lessees have expressly indicated an intention to change the address of record. This is because lessees may have more than one business office or more than one residence, or may be corresponding from a temporary address, or still be using checks imprinted with a former address, etc.

BLM used an address here that was taken from the rental payment envelope and check. The lessees' intention that this would be the address where future lease documents should be delivered is not shown in the records. By comparison, the rental due notice and the U.S. Treasury check were delivered and accepted at a different address. BLM's attempted delivery of the notice of termination, and its decision denying reinstatement, at an address other than the "last address of record" was not the service of the notice contemplated by the regulation.

As the lessees were not provided notice of the termination in accordance with the regulations, we next consider whether the June 14, 1983, letter was a reviewable petition for reinstatement. This letter did not mention therein that it was to be regarded as anything other than a comment to BLM about the rental payment. No request for reinstatement of the lease was made and there is no indication that the sender knew that the lease had terminated. Reviewed separately, it does not appear to be a petition for reinstatement. "Mrs. E. Solender" is not one of the lessees of record. While it is questionable why the letter was written if the writer was unaware of the lease termination, there is no basis for treating it as the petition for reinstatement. Further, the subsequent decision to deny it never became final and binding on the lessees in view of the failure to properly serve it. See Estate of Glenn F. Coy, 52 IBLA 182, 193-95, 88 I.D. 236, 242 (1981).

While failure to provide sufficient notice under these circumstances would provide grounds to set aside BLM's decision, we must consider that the lessees did file a document which set forth their request and arguments for reinstatement within 15 days after their first acknowledged receipt of the notice of termination. While BLM's reply does not appear as a formal decision, it responds to the statements made by the lessees and, in effect, denies their arguments. Solender and Devereaux appear before the Board to appeal from BLM's disposition of their request. Therefore, despite the procedural inadequacy of BLM's attempt to serve the notice of termination, the lessees were not prejudiced and have had an opportunity to present their arguments to BLM in favor of reinstating the lease.

[3, 4] We therefore proceed to review the substantive issue of this case. A terminated lease can be reinstated under this provision of the statute only if, among other requirements, the lessees show that failure to pay on time was either justifiable or not due to lack of reasonable diligence. 30 U.S.C. § 188(c) (1976); 43 CFR 3108.2-1(c).

A failure to make timely payment may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessees' control which affected their actions in paying the rental fee. Eleanor L. M. Dubey, 76 IBLA 177, 179 (1983). Reasonable diligence requires mailing the rental payment sufficiently in advance of the due date to account for normal delays in the collection, transmittal, and delivery of the mail. 43 CFR 3108.2-1(c).

Solender and Devereaux allege that their payment was mailed in California on Friday, May 27, 1983. If so, it had 5 days (a weekend, a Monday holiday, and 2 business days) to reach Wyoming before the lease terminated by operation of law. 1/ However, the postmark date on the envelope containing the rental payment is presumed to be the date of mailing, unless there is satisfactory corroborating evidence to support the lessees' assertion that the mailing occurred at a date earlier than that indicated by the postmark. Bryan Colley, 71 IBLA 299 (1983). A mere statement that the payment may have been hung up in the collection is inadequate. Eleanor V. Broda, 77 IBLA 63 (1983). Appellants have not shown any irregularity in the transmittal of mail by the U.S. Postal Service relative to their rental payment. 2/ We therefore are obliged to regard the mailing date of the payment as that marked on the received envelope, June 3, 1983. Mailing a payment after the rental due date does not constitute reasonable diligence. NP Energy Corp., 72 IBLA 34, 36 (1983); Kristie R. Cobb, 67 IBLA 59, 62 (1982).

Unsubstantiated speculation as to errors in handling and processing the payment by the Postal Service is not evidence of extenuating circumstances which will justify the untimely rental payment. Elizabeth A. Christensen, 52 IBLA 113 (1981). The burden of proving that failure to pay rentals on or before the anniversary date was either justifiable or not due to lack of

1/ Appellants assert that only 2 days transmittal time between California and Wyoming is sufficient. However, the June 14, 1983, letter was postmarked as mailed in California on that day, Tuesday, but was not received by BLM until 3 days later on Friday, June 17, 1983. Its transmittal period did not include a weekend or holiday.

The Oct. 21, 1983, letter supposedly mailed on that day (no postmark appears thereon) was not received by BLM until 4 days later on Tuesday, Oct. 25, 1983. Its transmittal period included a weekend.

2/ Where a postmark date conflicts with a date made by a private postage meter, the postmark will be presumptively considered the date of mailing. Max W. Young, 60 IBLA 224 (1981).

Corroboration of the date reflected by the postage meter stamp is required because it is susceptible, like the payment check, to whatever date the sender wishes to apply thereon. For example, appellants' request for reinstatement was received in an envelope with the meter stamp dated "OCT 21 '93."

reasonable diligence is the obligation of the lessees. In absence of such proof, the petition for reinstatement is properly denied. Eleanor V. Broda, supra; O. L. Foster, 72 IBLA 367 (1983). As circumstances at or near the due date which affected their ability to transmit the payment have not been shown by the appellants, we cannot find justification for the late payment which would warrant reinstatement pursuant to 30 U.S.C. § 188(c) (1976). 3/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

R. W. Mullen
Administrative Judge

3/ This adjudication is without prejudice to appellants' right to apply for reinstatement pursuant to 30 U.S.C. § 188(d) as amended Jan. 12, 1983, P.L. 97-451, 96 Stat. 2462).

